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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED,
Appellants,

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT	5
THE QUESTIONS ARE SUBSTANTIAL	8
1. Substantial Questions Raised by Complaint	8
2. Substantial Questions Raised by Appeal	10
A. Limited Jurisdiction of Customs Courts	11
B. Jurisdiction of District Courts	14
C. Limitations on Nonreviewable Discretion	15
APPENDIX A	
1—Opinion Below	19
2—Order of Dismissal	24
3—Finding of Dumping	25
4—Report of Tariff Commission	25
5—Letters of Secretary of Treasury	27
APPENDIX B	
1—28 U.S.C. 1340	29
2—28 U.S.C. 2201	29
3—28 U.S.C. 2202	29
4—28 U.S.C. 2282	29
5— 5 U.S.C. 1009	30

TABLE OF CASES

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752 (1947)	2
Bd. Gen. App. Abs. 46501	13
Cotonificio Bustese v. *Morgenthau*, 121 F. 2d 884 (C.A.D.C. 1941)	14, 15
Bultfield v. *Stranahan*, 192 U.S. 470 (1904)	16, 17
Calif. Water Service Co. v. *Redding*, 304 U.S. 252 (1938)	10, 13
Cosulich Line v. *Elting*, 40 F. 2d 220 (CA2, 1930)	14
Cottman v. *Dailey*, 94 F. 2d 84 (CA4, 1938)	11
Croton Watch Co. v. *Laughlin*, 208 F. 2d 93 (CA2, 1953)	14

PAGE

Ct. Cust. Abs. 18998 13

Cummings-Collins Distillery v. *U.S.*, 20 Cus. Ct. 93 12

De Lima v. *Bidwell*, 182 U.S. 1 (1901) 14

Door v. *Donaldson*, 195 F. 2d 764 (CADC, 1952) 16

Ducke & Sons v. *U.S.*, 36 CCPA 19 (1948) 13

Ex parte Poresky, 290 U.S. 30 (1933) 10

Goetz v. *U.S.*, 182 U.S. 221 (1901) 14

J. W. Hampton & Co. v. *U.S.*, 276 U.S.394 (1928) 15

Hayes v. *Port of Seattle*, 251 U.S. 233 (1920) 2

Helwig v. *U.S.*, 188 U.S. 605 (1903) 14

I.L.G.W.U. v. *Donnelly Garment Co.*, 304 U.S. 243 (1938) 10

Kleberg & Co. v. *U.S.*, 71 F. 2d 332, 21 CCPA 110 (1933) 13

Kurz & Co. v. *U.S.*, 13 Ct. Cust. App. 527 (1926) 13

Martin v. *Mott*, 12 Wheat. 19 (1827) 16

Monongahela Bridge Co. v. *U.S.*, 216 U.S. 177 (1910) 16, 17

Norwegian Nitrogen Products Co. v. *U.S.*, 288 U.S. 294 (1933) 15, 17

Riccomini v. *U.S.*, 60 F. 2d 480 (CA9, 1934) 11

Sterling v. *Constantin*, 287 U.S. 378, 393 (1932) 13

Stratton v. *St. Louis S.W. Ry.*, 282 U.S. 10, 14 (1930) 10

Tower v. *U.S.*, 21 CCPA 417 (1934) 12

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 2

U.S. v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 16

U.S. v. *Geo. S. Bush & Co., Inc.*, 310 U.S. 371 (1940) 15, 16, 17

U.S. v. *Marshall Field*, 94 F. 2d 210 (CCPA, 1938) 14

U.S. v. *Prym*, 17 CCPA 180 (1929) 12

U.S. v. *Rock Royal Cooperative*, 307 U.S. 533 (1939) 15, 17

U.S. v. *Sherman*, 237 U.S. 146 (1915) 12

U.S. v. *Tower & Sons*, 14 Ct. Cust. App. 421 (1927) 12, 13

Van Dyke v. *Geary*, 244 U.S. 39 (1917) 2

In The

Supreme Court of the United States

October Term, 1956

No......

A. W. Horton, John C. Fryer, and Camarge Trading Company, Incorporated,
Appellants,

v.

George M. Humphrey, Secretary of the Treasury, and the United States Tariff Commission,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Columbia, three judges sitting, entered on June 20, 1956, which ordered dismissed, for want of jurisdiction, a cause of action seeking to enjoin Appellees from enforcing a Finding of Dumping entered by the Secretary of the Treasury; and Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court ordering dismissal is reported at ——— F. Supp. ———. The order of the single-judge District Court entered in conformity with said opinion is reported at ——— F. Supp. ———. The above opinion and order, together with the Finding of Dumping issued by the Secretary of the Treasury and the report of the two administrative determinations which are conditions precedent to said Finding, are reproduced in full in Appendix A attached hereto.

JURISDICTION

This suit was brought under 28 U.S.C. Sections 1331, 1340, 2201-2, 2282, and 5 U.S.C. Section 1009, to enjoin the enforcement of the Finding of Dumping issued by the Secretary of the Treasury, on the grounds of unconstitutionality of the statute under which the Finding was issued, and invalidity of the Finding itself. The judgment of the three-judge Court, ordering dismissal for want of jurisdiction, was entered on June 20, 1956, and Notice of Appeal was filed in that Court on July 19, 1956. Since an order dismissing the cause of action is the equivalent of an order denying a temporary or permanent injunction, see *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947), the jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of this Honorable Court to review this judgment on direct appeal: *United Public Workers* v. *Mitchell, supra, Aircraft & Diesel Corp.* v. *Hirsch, supra, Hayes* v. *Port of Seattle*, 251 U.S. 233 (1920), *Van Dyke* v. *Geary*, 244 U.S. 39 (1917).

QUESTIONS PRESENTED

1. Having found that the instant complaint "involves sufficient constitutional problems to warrant the holding of

a Three-Judge Court," did the Three-Judge District Court below err in holding that jurisdiction does not lie in the District Court of this action which seeks to enjoin named Government officials from enforcing a rule or order alleged to be invalid, issued pursuant to an allegedly unconstitutional federal statute?

2. In an action which challenges the constitutionality of the Anti-Dumping Act of 1921, as amended in 1954, as well as the validity of a Finding of Dumping issued by the Secretary of the Treasury pursuant thereto, did the Three-Judge Court below err in holding that exclusive jurisdiction of such an action lies in the United States Customs Court?

3. Did the Three-Judge District Court err in holding that in such an action there is an adequate remedy at law provided by the United States Customs Court, when that Court and the Court of Customs and Patent Appeals have repeatedly ruled that they are without authority to determine the substantive validity of a Finding of Dumping?

4. In an action in which Plaintiffs seek injunctive relief against an invalid agency action which has the effect, inter alia, of terminating Plaintiffs' trade and business in the commodity here involved, did the District Court below err in holding that an adequate remedy is available in the Customs Court, which admittedly has no equity powers?

5. Did the Court below err in holding, in effect, that a Finding of Dumping issued by the Secretary of the Treasury, which is based on erroneous principles of law, which does not accord with the procedural requirements of the Administrative Procedure Act, and which is unsupported by substantial evidence, is not reviewable in any Court?

6. Did the Three-Judge District Court below err in treating as "taxes" rather than as "penalties" the "special dumping duties" which are threatened to be imposed retroactively on United States importers because of business transactions engaged in by their foreign suppliers?

STATUTES INVOLVED

Section 201(a) of the Anti-Dumping Act of 1921, as amended, 19 U.S.C. 160(a), provides as follows:

> "(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160-73 of this title called a "finding") of his determination and the determination of the said Commission. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers."

Section 210 of the Anti-Dumping Act, 19 U.S.C. 169, provides:

> "For the purposes of sections 160 to 171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; and the general appraisers, the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law."

The pertinent portions of 28 U.S.C. 1340, 2201, 2202, and

2282; and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, are set forth in Appendix B attached hereto.

STATEMENT

The Anti-Dumping Act of 1921, like its predecessor, the Anti-Dumping Act of 1916, 15 U.S.C. 72, partakes more of the nature of anti-monopoly legislation than of tariff legislation. It is in all major respects the counterpart of the Robinson-Patman Act, 15 U.S.C. 13, being designed to prevent injurious price discrimination in international trade as the Robinson-Patman Act is designed to prevent injurious price discrimination in interstate trade.

In the enforcement of the Anti-Dumping Act, the Secretary of the Treasury determines whether there has been, or is likely to be, price discrimination of the type proscribed by the statute, and the Tariff Commission then determines whether such discrimination has resulted in, or threatens, injury to a domestic industry. If both these determinations are made, a Finding of Dumping is issued by the Secretary, and his subordinates automatically proceed to assess "special dumping duties" against the importers, according to the formula prescribed by law.

In the application of that formula—i.e., in the fixing of the amount of the "special dumping duty" and its collection—there are many technical problems of import appraisement and tariff classifications, determined respectively by the Customs Appraiser and the Customs Collector. These technical problems, which are admittedly reviewable only in the Customs Court, 19 U.S.C. 169, *supra*, are not involved in the instant proceeding. When and if such problems arise affecting these imports of soil pipe, they will be appealable only to the Customs Court. This cause of action relates only to the constitutionality of the Anti-Dumping Act and to the validity of the Secretary's Finding of Dumping and of the two administrative determinations which are conditions precedent to that Finding.

The first of those determinations in the instant case was made by the Secretary of the Treasury on July 27, 1955, when he advised the Tariff Commission, by letter, that he had determined that imports of cast iron soil pipe from the United Kingdom were being, or were likely to be, sold at less than fair value. This administrative action was taken *in camera*, without public notice, notice to affected parties, hearings, or any opportunity to learn of the charges, to meet them, or to participate in any way in the agency determination. In the absence of any hearings, record, reasoning, justification or administrative opinion, it is impossible for Appellants or a reviewing Court to know the basis of the Secretary's determination, the nature of his investigation, or, indeed, whether there was any investigation at all. Apparently, however, the proceeding was initiated by a complaint filed on or about August 18, 1954, by a single domestic producer of soil pipe. This date has significance only because it means that all imports of this pipe since April 21, 1954, are subject to the assessment of dumping penalties, this being 120 days prior to the Secretary's first "suspicion" of dumping. See 19 U.S.C. 161.

Appellants, who have all been substantial importers of this soil pipe, will therefore, as a result of this Finding, be assessed dumping penalties retroactively on commodities they bought and sold as much as 19 months prior to the date of the Finding and more than a year before Appellants had any knowledge or notice that a dumping complaint had been filed against them or that an official dumping investigation was under way. Moreover, since they first acquired knowledge of these facts and as a direct result of these antidumping proceedings, Appellants have, as a practical matter, been unable to import or sell a single pound of such pipe and have effectively been forced out of the business of importing British standard cast iron soil pipe.

The second administrative determination in this case was made by the Tariff Commission when, on October 26, 1955, 90 days after it received the Secretary's certification,

it announced its conclusion that imports of this pipe were injuring, or were likely to injure, an industry in the United States. This determination was made on investigation which included a one-day public "hearing" on October 21, 1955, only three working days prior to the date its decision was due. In its published decision, although there are 50 or 60 cast iron soil pipe producers scattered throughout the United States, the Tariff Commission ruled, by a 4-1 vote, that the six producers located in California constituted a separate and distinct "industry in the United States." It also determined (by a 3-2 vote) that this "industry in the United States" was being injured, or was likely to be injured, by the imports involved, although uncontroverted official statistics put in evidence before the Commission showed that these imports constituted less than four-tenths of 1% of the cast iron soil pipe produced in the United States.

On the following day, October 27, 1955, the Secretary of the Treasury issued his Finding of Dumping, stating that "*the* industry manufacturing cast iron soil pipe in the United States" was being, or was likely to be, injured by imports of such pipe at less than fair value, although this differed substantially from the Tariff Commission's determination that "*an* industry" consisting of six California producers was being so affected.

On November 18, 1955, Appellants petitioned the Secretary for reconsideration of the Finding of Dumping. On January 25, 1956, this petition was denied by the Secretary. Subordinates of the Secretary were proceeding to assess "special dumping duties" against Appellants, retroactively to their entries since April 21, 1954, when Appellants filed suit in the District Court on March 19, 1956, to enjoin enforcement of the Finding on the constitutional and statutory grounds stated. The three-judge District Court on June 20, 1956, ordered the action dismissed, holding that this cause was within the exclusive jurisdiction of the Customs Court. On June 21, the single-judge District Court entered

the order of dismissal. Notice of Appeal to the Supreme Court was filed on July 19, 1956, and an injunction pending appeal was issued by the District Court on August 1, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The substantiality of the constitutional questions here raised is not an issue in this appeal. Unlike the usual case presented on appeal of a three-judge court's dismissal for lack of jurisdiction, turning on the absence of a substantial federal constitutional question, the appeal in the instant case is from a three-judge decision which specifically concedes the substantiality of the federal constitutional questions presented. The Court below stated:

> "* * * since the Supreme Court has not passed on the matter, we feel that at least the questioned portion of the Act, which is being applied here and which is alleged to impose the tax retroactively, *involves sufficient constitutional problems to warrant the holding of a three-judge court*—provided jurisdiction of these problems is not placed elsewhere." ___ F. Supp. ___, ___; Appendix A, p. 20. (Emphasis supplied.)

Thus, the Court below has held—correctly, we believe—that if this cause is properly in a District Court, it must be a three-judge Court, because of both the issues presented and the remedy sought.

1. Substantial Questions Raised by the Complaint

A summary of the complaint is sufficient to show the grave questions of jurisdiction, procedure and substance, involving both constitutional and statutory requirements, presented by this cause:

Unconstitutionality of the Anti-Dumping Act. The complaint alleges that the Anti-Dumping Act of 1921, as amended, violates the Constitution of the United States in two regards: (a) first, in that the statute permits and authorizes the imposition of retroactive administrative penalties without notice, hearings, or opportunity to know

and meet the charges or otherwise to participate in the administrative process, thus depriving importers of their property without due process of law; and (b) secondly, in that the statute, by failing to define the meaning or the scope of such key words as "dumping," "fair value," "injury," or "industry," and by failing to provide either legislative standards or procedural safeguards, provides for an invalid delegation of legislative power.

Invalidity of Administrative Procedure. The determinations by the Secretary of the Treasury and the United States Tariff Commission, but particularly the *in camera* determination of the Secretary, completely ignored the procedural requirements of the Administrative Procedure Act, although both Appellees are "agencies" as defined in the statute and both determinations, as well as the Finding of Dumping subsequently issued by the Secretary, are clearly "agency actions" within the meaning of that statute (5 U.S.C. 1001 (a), (g)).

Invalidity of "Fair Value" Determination. The "fair value" regulations issued by the Secretary of the Treasury, pursuant to which the Finding of sales at "less than fair value" in the instant proceeding was apparently made, misconstrues the Congressional intent embodied in the provisions of the Anti-Dumping Act of 1921, by accepting as evidence of sales at "less than fair value" a mere mathematical price differential between sales in one national market and sales in another, without regard to whether or not such sales had the purpose or effect of "dumping," or whether the price in the United States market was a "fair" price in terms of that market, or whether the lower price in one market was dictated by the need for meeting competition in that market, or the various other factors that inevitably enter into a determination of a fair price in the sale of any commodity.

Invalidity of "Injury" Determination. The geographical segmentation by which the Tariff Commission deter-

mined that the small number of producers located in one State of the Union constituted a separate "industry in the United States" does not conform either to the statutory requirements for a determination that "an industry in the United States" is being injured, nor did it conform to the determination in the Secretary's Finding of Dumping that "*the* industry manufacturing cast iron soil pipe in the United States" was being injured. The California producers constitute less than 10% of the United States industry and produce less than 8% of the soil pipe produced in the United States, yet they were held to be a separate and distinct industry in the United States, within the meaning of the statute. Moreover, it was held that imports which constituted less than four-tenths of 1% of U. S. production and sales were injuring, or were likely to injure, an industry which had consistently increased its capacity, production, sales and profits during the period of alleged "dumping."

These allegations raise not only serious legal questions as to constitutional and statutory law, but also grave issues of national policy in the vital field of international trade.

2. Substantial Questions Raised by the Appeal

Since the constitutional issues raised by the complaint are substantial, *cf. Ex parte Poresky*, 290 U.S. 30 (1933), and are not precluded by any previous decisions of this Court, *cf. Calif. Water Service Co.* v. *Redding*, 304 U.S. 252 (1938), since the complaint seeks injunctive relief because of the statute's unconstitutionality, *cf. I.L.G.W.U.* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938), and the prayer for injunctive relief has been pressed by Appellants, *cf. Stratton* v. *St. Louis S.W. Ry.*, 282 U.S. 10, 14 (1930), there remains for consideration only the questions relating to the jurisdiction of the District Courts as compared to that of the Customs Courts.

The heart of the problem presented by this Appeal is in the conflict between the decision below, which denies District

Court jurisdiction because the exclusive remedy lies in the Customs Court, and decisions of the Customs Court that it has neither remedy nor power of review in such cases. Thus, the Court below has told Appellants that their challenge to the validity of administrative action and their plea for equitable relief from an administrative penalty can be determined only in a Court which has repeatedly denied its jurisdiction to review the substantive validity of such actions or the legal basis of such penalty. If this conflict is not resolved, then Appellants and all other citizens similarly situated have no remedy, either at law or in equity, to protect themselves against retroactive penalties or, indeed, a complete cessation of business resulting from an arbitrary and capricious administrative decision.

A. *Limited Jurisdiction of Customs Courts*

The United States Customs Court, which the Court below held has exclusive jurisdiction of these issues of constitutional and statutory validity, is an administrative appellate tribunal whose name was changed in 1926 from the Board of General Appraisers to the Customs Court, Act of May 28, 1926. In the determination of regular customs duties, as in the determination of "special dumping duties," the jurisdiction of the Customs Courts is based upon an expert reappraisal of the technical facts that enter into the activities of the Customs appraisers and the Customs collectors in assessing such duties. In the case of regular Customs duties, where no other agency action intervenes between the statute and the collection, this system of judicial review apparently provides a "system of corrective justice * * * complete in itself * * * in relation to the collection of (customs) revenues," *Riccomini* v. *U. S.*, 60 F. 2nd 480 (CA9 1934), *Cottman* v. *Dailey*, 94 F. 2nd 84 (CA4, 1938).

In the case of "special dumping duties," however, where the Finding of the Secretary of the Treasury, and the two administrative determinations which are conditions prece-

dent to that Finding, intervene between the statutory provision and the technical assessment of the duty, no provision is made for review of such agency action and no jurisdiction is vested in the Customs Court to make such review. Section 210 of the Anti-Dumping Act, 19 U.S.C. 169, quoted *supra*, specifically makes the "determination of the appraiser" and the "action of the collector" subject to review in the Customs Court, but makes no provision for Customs Court review of the decision of the Secretary or of the Tariff Commission. This accords with the status of the Customs Court as an administrative tribunal composed of experts in the technical field of appraisement and classification. The status of the Customs Courts as "special statutory tribunals of limited jurisdiction," *U. S.* v. *Sherman*, 237 U.S. 146 (1915), has been clearly recognized by the Customs Court itself, which has described itself as "a court of limited special jurisdiction, and without equitable jurisdiction," *Cummings-Collins Distillery* v. *U. S.*, 20 Cus. Ct. 93, *aff'd* 36 CCPA 88.

Beyond reviewing the technical evaluation by the appraiser and classification by the collector, the Customs Court has assumed the power to review, within a very narrow orbit, the degree of compliance with the *form* of assessment and collection procedure followed in anti-dumping cases. Where, for example, the Customs officials have not examined the goods as required by statute, *Tower* v. *U. S.*, 21 CCPA 417 (1934), or the Finding of Dumping has not been signed by a proper official, *U. S.* v. *Prym*, 17 CCPA 180 (1929), or the imports involved were not described, *U. S.* v. *Tower*, 14 Ct. Cust. App. 421 (1927), the particular Finding has been ruled invalid and unable to support the assessment.

But where the issue raised by a complaint has turned on the substantive validity of the Secretary's action, the conformance of his action with the mandate of the law, whether it was based on a proper investigation or, indeed, on any investigation at all, or whether it was based on sub-

stantial probative evidence or, indeed, on any evidence, the Customs Court and the Court of Customs and Patent Appeals have repeatedly ruled that they are without authority to inquire into these matters. Thus, the Board of General Appraisers, before it became the Customs Court, ruled that "the finding of the Secretary of the Treasury * * * is an exercise of discretion not reviewable by the Board." *Bd. Gen. App. Abs.* 46501.

The Customs Court has said it is "bound" by the Secretary's finding and "cannot go behind such finding." *Cus. Ct. Abs.* 18998. And the Court of Customs and Patent Appeals has ruled that "if the Secretary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions." *Kleberg & Co.* v. *U. S.*, 71 F. 2d 332, 335, 21 CCPA 110 (1933). See also *U. S.* v. *Tower & Sons*, 14 Ct. Cus. App. 421 (1927), *Kurz & Co.* v. *U. S.*, 13 Ct. Cus. App. 527 (1926); *cf. Duche & Sons* v. *U. S.*, 36 CCPA 19 (1948).

Occasionally, as noted by the Court below, the Customs Courts, while denying their authority to consider the validity of the Secretary's finding, have assumed the power to pass on the constitutionality of the Anti-Dumping Act, in cases otherwise properly before them. *Kleberg* v. *U. S.*, *supra*. This fact does not establish their jurisdiction over such issues, any more than the power of this Honorable Court to pass on issues of state and local law in cases otherwise properly before it (*e.g., Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932), *California Water Service Co.* v. *Redding, supra*) vests this Court with original jurisdiction over such state or local issues. Nor does this assumption of jurisdiction by the Customs Court make their review complete or their remedy adequate, for these courts lack not only the equity jurisdiction necessary to grant the relief demanded, but also the requisite authority to pass on major issues raised in this cause. *Kleberg et al., supra.*

Thus, in these circumstances, the remedy at law is "absent" or, at the very least, "inadequate," within the

meaning of the Administrative Procedure Act, 5 U.S.C. 1009(b), and jurisdiction properly lies in the District Court, sitting as a court of equity, as the only reviewing court competent to pass on all the major issues presented and to grant the relief demanded.

B. *Jurisdiction of District Courts*

The jurisdiction of the District Courts to consider a variety of "customs" matters dealing with problems other than appraisement or classification is apparent both from the law and the decisions. Aside from the general grant of 28 U.S.C. 1331, the Judicial Code, 28 U.S.C. 1340, specifically vests in the District Courts "original jurisdiction of any civil action arising under any Act of Congress providing for * * * revenue from imports * * * except matters within the jurisdiction of the Customs Court." If this provision is to have any meaning, it must be that there are matters relating to customs ("revenue from imports") that are *not* within the exclusive jurisdiction of the Customs Court. See *Croton Watch Co.* v. *Laughlin*, 208 F. 2d 93 (CA2, 1953); *U. S.* v. *Marshall Field Co.*, 94 F. 2d 210 (CCPA, 1938); *cf. De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Goetze* v. *U. S.*, 182 U.S. 221 (1901); *Cosulich Line* v. *Elting*, 40 F. 2d 220 (CA2, 1930).

The need for District Court review in these circumstances is emphasized, though not necessarily dependent upon, the further fact that the "special dumping duties" here involved are not Customs duties assessable under a taxing statute, but are penalties imposed by a regulatory statute. The "special dumping duty" imposed over and above the regular Customs duty on the imports is comparable in all respects to the "additional duty" for undervaluation held to be a penalty in *Helwig* v. *U. S.*, 188 U.S. 605 (1903), and the "additional duty" for failure to mark properly, held to be a penalty in *Cotonificio Bustese* v. *Morgenthau*, 121 F. 2d 884 (C.A.D.C. 1941). Since the reviewing power of the

Customs Courts is based upon its expert analysis of appraisement and classification problems, 28 U.S.C. 1541, the Courts have held that problems involving penalties, which are independent of such appraisement or classification, are properly cognizable in a District Court, *Helwig* and *Bustese, supra.*

C. *Limitations on Nonreviewable Discretion*

We submit that the Court below in denying its own jurisdiction over the issues and relegating Appellants to another Court which has consistently denied its jurisdiction cannot be sustained unless the agency actions here involved are not reviewable in any Court. If this is so, then the violation of due process becomes complete, for not only is the agency given *carte blanche* to devise its own procedures and establish its own definitions and standards, but it is also entirely free of any procedural safeguards that might restrain the unfettered exercise of administrative caprice, *U. S.* v. *The Rock Royal Cooperatives*, 307 U.S. 533 (1939).

The close similarity between the Anti-Dumping Act and the Robinson-Patman Act, already noted, *supra* p. 5, emphasizes the inequity and invalidity of the procedure to which Appellants have been forced by the decision below. If exclusive review lies in a court which can consider only the correctness of the *amount* of the penalty but can not consider either the procedure or the substantiality of the evidence supporting the finding of price discrimination and injury, then it is as though a court reviewing a Robinson-Patman action could pass on the amount of treble damages but could not review the evidence to see whether the law had in fact been violated.

This unwarranted and unnecessary extension of the doctrine of unreviewable discretion is apparently based on a misconstruction of the principles enunciated by this Court in *U. S.* v. *Geo. S. Bush & Co., Inc.*, 310 U.S. 371 (1940), *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U.S. 294 (1933), *J. W. Hampton Co.* v. *U. S.*, 276 U.S. 394 (1928).

The area of unreviewable administrative discretion has been severely circumscribed by statute and the decisions of this Court. When the applicability of a Congressional enactment turns on a decision by the President that, "in his opinion" or "in his judgment," a particular situation exists, such as a state of war in this country (*Martin* v. *Mott*, 12 Wheat. 19 (1827)) or abroad (*U. S.* v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936)), such determination is obviously conclusive. When the applicability of a statute turns on the existence of "physical facts as to which there is little room for difference of opinion" (*Door* v. *Donaldson*, 195 F. 2d 764 (CADC, 1952)), such as the existence of cost differentials under the "flexible tariff" provisions (*U. S.* v. *George S. Bush & Co., supra*), the recognition of the existence of such facts is conclusive. When the applicability of the statute turns on a scientific judgment of technical facts peculiarly within the competence of highly specialized administrative officers, like the quality of tea (*Buttfield* v. *Stranahan*, 192 U.S. 470 (1904)) or the effect of a bridge on the navigability of a river (*Monongahela Bridge Co.* v. *U.S.*, 216 U.S. 177 (1910)) it has been held that the judgment of the jury or the reviewing court can not be substituted for that of the administrator.

But, in the case of the Anti-Dumping Act, the Secretary's determination of "fair value" is no more unreviewable than a determination of "fair and reasonable value" by the Federal Power Commission, 16 U.S.C. 807, or a determination of "reasonable" rates by the Interstate Commerce Commission, 49 U.S. 1. And the Tariff Commission's determination of "injury" is no more unreviewable than a determination of "injury" under the antitrust laws, 15 U.S.C. 13. Here there is no peculiar Executive power, or readily ascertainable fact, or scientific judgment of peculiarly technical considerations. There is nothing that sets these administrative determinations apart from the scores of others that

are, and must be, subject to the restraining hand of judicial review.

This conclusion is buttressed by the further fact that the administrative action here involved imposes a penalty rather than a customs duty *(cf. U. S.* v. *George S. Bush & Co., Inc., supra)*; that the administrative sanction is retroactive *(cf. Buttfield* v. *Stranahan, supra)*; that it is made without notice or hearing *(cf. Monongahela Bridge Co.* v. *U. S., supra,* and *Norwegian Nitrogen Products* v. *U. S., supra)*; and that there are no "procedural safeguards" to protect against administrative caprice *(U. S.* v. *Rock Royal Cooperatives, supra)*.

For these reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

JAMES R. SHARP, *Counsel for Appellants*

SHARP & BOGAN
1108 16th Street, N.W.
Washington 6, D. C.

Of Counsel:
EUGENE F. BOGAN
WM. J. BARNHARD

APPENDIX A

1—*Opinion Below*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Jan. 20, 1956. Harry M. Hull, Clerk

Civil Action No. 1038-56

A. W. Horton, John C. Fryer, and Camarge Trading Co., Inc.,
Plaintiffs,
v.
George M. Humphrey, Secretary of the Treasury, and United States Tariff Commission,
Defendants.

Before: Washington, Circuit Judge, and Wilkin and McGuire, District Judges, holding a statutory three-judge court.

Washington, Circuit Judge: Plaintiffs are importers of cast iron soil pipe from the United Kingdom. They are threatened with application of a "special dumping duty" under the Anti-Dumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.* (1952). They ask a declaratory judgment that the Act is in violation of the United States Constitution, that certain procedures under the Act or under the Administrative Procedure Act have not been complied with, and that certain findings of the Secretary of the Treasury and the United States Tariff Commission, defendants here, are invalid. For these reasons, they ask that the Secretary of the Treasury and his agents and subordinates be enjoined from further action under the Anti-Dumping Act with respect to their pipe imports.

Because one of the reasons given for seeking issuance of the injunction is alleged repugnance of the Anti-Dumping Act to the Constitution, a three-judge district court has been convened. 28 U.S.C. § 2282 (1952). Plaintiffs urge two constitutional contentions. The first is that the effect of the Act is retroactive, in that the dumping duty may be imposed on goods imported up to 120 days prior to the time the question of dumping was first raised by or presented to the Secretary of the Treasury, and in that the time when the question is first raised or presented to the Secretary of the Treasury may itself be substantially before the importer first hears of the proceeding or of the possibility of an additional duty being imposed. This, they say, deprives plaintiffs of their property without due process. The second contention is that the failure to define important terms in the Act constitutes an invalid delegation of legislative power because it leaves the Secretary of the Treasury and the Tariff Commission free to act without any legislative standards to guide them.

The Anti-Dumping Act has long since been ruled constitutional by the Court of Customs and Patent Appeals, *Kleberg & Co.* v. *United States*, 21 C.C.P.A. 110, 71 F. 2d 332 (1933); *C. J. Tower & Sons* v. *United States*, 21 C.C.P.A. 417, 71 F. 2d 438 (1934), and by the Second Circuit, *Kreutz* v. *Durning*, 69 F. 2d 802 (1934). However, particularly since the Supreme Court has not passed on the matter, we feel that at least the questioned portion of the Act, which is being applied here and which is alleged to impose the tax retroactively, involves sufficient constitutional problems to warrant the holding of a three-judge court—provided jurisdiction of these problems is not placed elsewhere. In the instant case the complaint asserts that the tax will be applied to importations starting on April 21, 1954,[1] and that there was no notice to plaintiffs that would warn them of

[1] Apparently this date is not a matter of administrative record but merely established by informal advice to plaintiffs; as of the administrative record the extent of retroactivity appears to be still undefined.

risk of liability for the duty until midsummer 1955. Taking these allegations at their face value, the hardship to plaintiffs is apparent.[2]

Nonetheless, we think that the complaint must be dismissed. The imposition of a duty may under the statutory plan be reviewed by the Customs Court and the Court of Customs and Patent Appeals (with recourse to the Supreme Court through petition for certiorari). This statutory form of review has been held, in comparable situations, to constitute an adequate remedy at law and therefore to bar equitable relief, and to be the exclusive method of review. *Boston Wool Trade Ass'n* v. *Snyder*, 82 U.S. App. D.C. 144, 161 F. 2d 648 (1947); *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (4th Cir. 1938); *cf. Kreutz* v. *Durning, supra.* And see *Morgantown Glassware Guild* v. *Humphrey*, —— U.S. App. D.C. ——, —— F. 2d —— (decided June 7, 1956); *Patchogue* v. *Plymouth Mills Corp.*, 101 F. 2d 41 (2d Cir. 1939); *Riccomini* v. *United States*, 69 F. 2d 480 (9th Cir. 1934). The fact that an importer does not need to pay a challenged duty until this method of review has been exhausted goes far to sustain the decisions just cited. So also does the possibility that the specialized customs courts may never be required to reach the question of constitutionality: they may decide for plaintiffs on some quite unrelated ground. Plaintiffs contend that the present case is different from those cited because, they say, the specialized customs courts cannot review the constitutionality of the Act or whether the Secretary of the Treasury's findings or those of the Tariff Commission are supported by the evidence. That the jurisdic-

[2] The Government argues that the risk of liability for additional duties appears from the face of the Anti-Dumping Act itself. This seems rather unrealistic in the light of the fact that importers must usually fix prices and sell their goods as promptly as they can and in the light of plaintiffs' contention that as a practical matter they cannot keep track of the prices at which the imported items are being sold abroad. However, in Kreutz v. Durning, *supra*, the Second Circuit sustained the statute in spite of the retroactivity problem. And certainly any alleged retroactivity beyond the 120-day period could be raised in the Customs Court, as well as the question of the validity of any retroactivity during that statutory period.

tion of the Customs Court and the Court of Customs and Patent Appeals extends beyond the mere review of accuracy of appraisals and classifications of merchandise is shown by the cases noted above, and particularly those in which the Court of Customs and Patent Appeals passed on the constitutionality of the Anti-Dumping Act; see also *United States* v. *Central Vermont Ry. Co.*, 17 C.C.P.A. 166 (1929).[3] It is true that in *T. M. Duche & Sons* v. *United States*, 36 C.C.P.A. 19 (1948), cert. denied, 336 U.S. 931 (1949), and *T. M. Duche & Sons* v. *United States*, 39 C.C.P.A. 186, cert. denied, 344 U.S. 830 (1952), the court did decline to examine the validity of certain actions of the Tariff Commission and the President, but this was only because of the theory that these actions could not be reviewed by any judicial body, and not because of any limitation of jurisdiction peculiar to the Customs Court or the Court of Customs and Patent Apepals.[4]

We recognize, of course, that neither the Customs Court nor the Court of Customs and Patent Appeals appears to have the equity powers of a district court. See 28 U.S.C. §§ 1541-43, 1581-83 (1952). Thus in import duty matters, if the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals is exclusive, there may be no way to obtain the equitable relief in situations of extreme hardship which the Supreme Court has occasionally permitted in internal revenue cases despite the statute[5] flatly prohibiting injunctions in tax matters. E.g., *Miller* v. *Standard*

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[3] *Cf.* 28 U.S.C. § 1583 (1952), which gives the Customs Court exclusive jurisdiction to review "the decisions of any collector of customs, *including all orders and findings entering into the same*, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury . . . ." (Emphasis supplied.)

[4] *Cf.* David L. Moss Co. v. United States, 26 C.C.P.A. 381, 103 F. 2d 395 (1939).

[5] INT. REV. CODE of 1954 § 7421. This section is applicable to tariff matters. Cottman Co. v. Dailey, *supra*. With respect to plaintiffs' requests for declaratory relief it should be noted that 28 U.S.C. § 2201 (1952), creating the remedy of a declaratory judgment, specifically excepts controversies regarding Federal taxes from those cases in which declaratory relief may be given.

Nut Margarine Co. of Florida, 284 U.S. 498 (1932); *Hill* v. *Wallace*, 259 U.S. 44 (1922). Since the threat of imposition of the dumping duty is alleged by the complaint to have forced plaintiffs out of the business of importing the type of pipe involved, the case might—as an original proposition—fall within the exceptions the Supreme Court has carved in this statute, even though (as we have noted) plaintiffs would not have to pay the additional duty until they had exhausted their remedy in the Customs Court and in the Court of Customs and Patent Appeals. But we think it is too clearly established that those courts provide an adequate and exclusive remedy in this sort of case for us to make an exception here.

Accordingly, the cause will be remitted to District Judge McGuire, sitting as a single judge, for appropriate action not inconsistent with this opinion.

So ordered.

/s/ GEORGE T. WASHINGTON
Circuit Judge

/s/ ROBERT N. WILKIN
District Judge

/s/ MATTHEW F. McGUIRE
District Judge

June 20, 1956.

2—Order of Dismissal

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1038-56

A. W. HORTON, ET AL.,
Plaintiffs,

v.

GEORGE M. HUMPHREY, ET AL.,
Defendants.

ORDER

This cause having come on for hearing before a statutory three-judge court on defendants' motion to dismiss and plaintiff's opposition thereto, and the statutory three-judge court having determined that the complaint must be dismissed as there is an adequate and exclusive remedy in the Customs Court, Court of Customs and Patent Appeals, and the Supreme Court; and the statutory three-judge court having remitted this cause to this Court, sitting as a single judge, for appropriate action not inconsistent with the opinion of that statutory three-judge court, it is this 21st day of June, 1956,

ORDERED, That defendants' motion to dismiss be and it is hereby granted.

/s/ MATTHEW F. McGUIRE
Judge

3—Finding of Dumping

DEPARTMENT OF THE TREASURY
Bureau of Customs
[T. D. 53934]

CAST IRON SOIL PIPE FROM UNITED KINGDOM

ANTIDUMPING

October 27, 1955.

After due investigation, in accordance with the provisions of section 201 (a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160 (a)), the United States Tariff Commission on October 26, 1955, notified the Secretary of the Treasury of its determination that the industry manufacturing cast iron soil pipe in the United States is being, or is likely to be injured, by reason of the importation into the United States of cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom.

Pursuant to the provisions of said section 201 (a) of the Antidumping Act of 1921, as amended, I find that cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom is being, or is likely to be, sold in the United States at less than its fair value.

[SEAL] DAVID W. KENDALL,
Acting Secretary of the Treasury.

4—Report of Tariff Commission

UNITED STATES TARIFF COMMISSION

WASHINGTON

PUBLIC INFORMATION

For release October 27, 1955

TREASURY DEPARTMENT STATEMENT CONCERNING CAST IRON SOIL PIPE FROM THE UNITED KINGDOM

There is reproduced below the Treasury Department an-

nouncement concerning its action with respect to cast iron soil pipe from the United Kingdom.

• • • • • • • • • • • •

The Treasury Department today announced a finding of dumping with respect to importations of cast iron soil pipe from the United Kingdom. This finding was issued after notification by the United States Tariff Commission of an opinion arrived at by a majority vote, that an industry in the United States is being, or is likely to be, injured by reason of the importation of cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom at less than fair value.

The law requires that under these circumstances a special duty be levied on importations of cast iron soil pipe other than "American pattern" Cast iron soil pipe from the United Kingdom which are sold at less than foreign market value as defined by the Antidumping Act.

The letter of notification to Treasury Secretary Humphrey from the Tariff Commission is as follows:

October 26, 1955

Dear Mr. Secretary:

Reference is made to the letter from the Acting Secretary of the Treasury, dated July 26, 1955, advising that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold in the United States at less than its fair value as that term is used in the Antidumping Act, 1921, and to your letter of October 18, 1955, stating that such determination did not apply to "American pattern" cast iron soil pipe.

After investigation in accordance with the provisions of section 201(a) of the Antidumping Act, 1921, as amended, including a public hearing, the Commission, by a majority vote (Commissioners Brossard, Talbot, and Dowling), has determined that a domestic industry in the United States is being, or is likely to be, injured by reason of the importation of cast iron soil pipe, other than "American pattern"

cast iron soil pipe, from the United Kingdom at less than fair value.

The domestic industry to which the Commission's determination of injury relates was held to consist of the producers of cast iron soil pipe in the State of California (Commissioner Sutton dissenting). Commissioners Sutton and Jones disagreed with the majority of the Commission's finding that the California producers of cast iron soil pipe are being, or are likely to be, injured by reason of the importation of cast iron soil pipe from the United Kingdom at less than fair value.

Commissioner Schreiber, who, after participating in the hearing, was called to the West Coast because of illness in the family, has advised the Commission of his views in this case, and they are in accord with the views of the majority.

Sincerely yours

EDGAR B. BROSSARD
Chairman

NOTE: The letter to the Secretary of the Treasury constitutes the report in this case; no further report is available.*

5—*Letters of Secretary of Treasury*

July 26, 1955

My dear Mr. Brossard:

In accordance with section 201(a), Antidumping Act, 1921, as amended, you are hereby advised that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold in the United States at less than fair value as that term is used in the Antidumping Act.

The Bureau of Customs will be glad to make available to the Tariff Commission the Bureau's file on sales or likeli-

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* *This note was appended to the official Tariff Commission report.*

hood of sales at less than fair value for the Commission's use in connection with its investigation as to whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

Since some of the data in such file is regarded by the Bureau of Customs to be of a confidential nature, it is requested that the Tariff Commission consider all information therein contained to be for the official use of the Tariff Commission only, and not to be disclosed to others without prior clearance with the Bureau of Customs.

Sincerely yours,

/s/ H. CHAPMAN ROSE
Acting Secretary of the Treasury

Honorable Edgar B. Brossard
The Chairman
United States Tariff Commission
Washington 25, D. C.

Oct. 18, 1955

My dear Mr. Brossard:

This will confirm advice which has been communicated informally to your office that no instances have been found of sales of "American pattern" cast iron soil pipe from the United Kingdom at less than fair value, and that our determination, communicated to you on July 26, 1955, that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold at less than fair value, does not apply to "American pattern" cast iron soil pipe.

Sincerely yours,

(Signed) DAVID W. KENDALL
Acting Secretary of the Treasury

APPENDIX B

1—"28 U.S.C. 1340 Internal Revenue; customs duties

"The District Courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

2—"28 U.S.C. 2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139 § 111, 63 Stat. 105."

3—"28 U.S.C. 2202. Further relief

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964."

4—"28 U.S.C. 2282. Injunction Against Enforcement of Federal Statute; Three-Judge Court Required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges

under section 2284 of this title. (June 25, 1948, c. 646, 62 Stat. 968)''

5—''5 U.S.C. 1009. *Judicial review of agency action*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

Rights of Review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of

this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for any appeal to superior agency authority.

Relief Pending Review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the require-

ments of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

INDEX

	Page
Statement	1
Argument	2
Conclusion	8
Appendix A	9
Appendix B	10

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752	6, 7
Boston Wool Trade Ass'n v. *Snyder*, 161 F. 2d 648	5
Cottman Co. v. *Dailey*, 94 F. 2d 85	5, 6
David L. Moss Co. v. *United States*, 103 F. 2d 395	5
Franklin v. *Jonco Aircraft Corp.*, 346 U. S. 868, summarily reversing, *Jonco Aircraft Corp.* v. *Franklin*, 114 F. Supp. 392	6
Gulbenkian v. *United States*, 186 Fed. 133	5
Hampton, Jr., & Co. v. *United States*, 14 Ct. Cust. Appls. 350, affirmed, 276 U. S. 394	7
Kleberg v. *United States*, 71 F. 2d 332	7
Morgantown Glassware Guild, Inc. v. *Humphrey*, C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389	5, 6, 7
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	6
Oklahoma Gas Co. v. *Packing Co.*, 292 U. S. 386	8
Patchogue-Plymouth Mills Corp. v. *Durning*, 101 F. 2d 41	5
Poresky, Ex parte, 290 U. S. 30	8
Riccomini v. *United States*, 69 F. 2d 480	5, 6
Smith v. *Wilson*, 273 U. S. 388	8
United States v. *Central Vermont Ry. Co.*, 17 C. C. P. A. 166	7
United States v. *Cottman Co.*, 190 F. 2d 805, certiorari denied, 342 U. S. 903	5
United States v. *Fox River Butter Co.*, 20 C. C. P. A. 38, certiorari denied, 287 U. S. 628	7

Cases—Continued Page
United States v. *William Prym*, 17 C. C. P. A. 180---- 7
United States v. *Sears, Roebuck & Co.*, 20 C. C. P. A. 295---- 7
United States v. *Sherman & Sons Co.*, 237 U. S. 146--- 5
United States v. *Tower & Sons*, 14 Ct. Cust. Appls. 421- 7
Statutes:
Act of May 27, 1921 (The Anti-Dumping Act), 42 Stat. 11, as amended, 19 U. S. C. 160 et seq---- 1, 5, 11
Section 210 (19 U. S. C. 169)---- 5
Customs Administration Act of 1890 (26 Stat. 131):
Section 12 ---- 4
Section 13 ---- 4
Section 14 ---- 4
Section 15 ---- 4
Judicial Code (1948 Revision), 62 Stat. 943---- 4
Public Law 703, 84th Congress, Second Session---- 4
Tariff Act of 1909 (36 Stat. 11, 91):
Section 29 ---- 4
44 Stat. 669---- 4
28 U. S. C. 1253---- 2, 7, 10
28 U. S. C. 1256---- 4, 10
28 U. S. C. 1340---- 3, 10
28 U. S. C. 1541---- 4
28 U. S. C. 1583---- 3, 4, 6, 10
28 U. S. C. 2282---- 8, 11
Miscellaneous:
Revised Rules of the Supreme Court:
Rule 16 ---- 1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED, APPELLANTS

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16 of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed or, in the alternative, that the appeal be dismissed.

STATEMENT

By this suit filed in the United States District Court for the District of Columbia, appellants sought a declaratory judgment that the Anti-Dumping Act of 1921, as amended, 19 U. S. C. 160, *et seq.*, is, in part, repugnant to the United States Constitution, and that certain actions and findings of the Secretary of the Treasury and the Tariff Commission, under that Act,

are invalid. The complaint also sought temporary and permanent injunctions suspending and enjoining the operation, execution and enforcement of the Act. Upon appellants' demand, a statutory three-judge court was convened to determine the issues raised by the complaint. Appellees moved to dismiss the action because of a lack of jurisdiction in the district court. Upon consideration of this motion, the three-judge district court decided that the district court was without jurisdiction (Jurisdictional Statement, pp. 19–23) and by order dated June 20, 1956 (*infra*, p. 9) remitted the cause to a single district judge "for appropriate action". The action was dismissed on June 21, 1956 by order of a single district judge (Jurisdictional Statement, p. 24). This direct appeal from the order of June 20, 1956, purportedly taken under 28 U. S. C. 1253, followed.

ARGUMENT

Upon consideration of appellees' motion to dismiss the complaint, the three-judge district court determined that the district court was without jurisdiction of the case for the reason that Congress has vested exclusive jurisdiction of the subject matter of appellants' complaint in the Customs Court and the Court of Customs and Patent Appeals. In accordance with this determination, the three-judge court remitted the cause to a single district judge for dismissal.

Since the jurisdictional determination by the district court marked the end of its inquiry, the only question before this Court on appeal is whether the established review procedure available to appellants

in the Customs Court and the Court of Customs and Patent Appeals constitutes appellants' exclusive judicial remedy. Relevant statutory considerations clearly demonstrate the correctness of this ruling. We believe accordingly that the appeal does not present a substantial question.

1. Through the establishment of the Customs Court and the Court of Customs and Patent Appeals, with ultimate review in this Court by a writ of certiorari, Congress has established a complete method of obtaining corrective redress for asserted grievances or wrongs occurring in the operation of laws relating to the assessment and collection of customs duties. And in providing a specialized forum for considering customs controversies, Congress has gone further and, with language too clear to be subject to dispute, has provided that the jurisdiction vested in the Customs Courts shall be exclusive. 28 U. S. C. 1583 (*infra*, p. 10) declares:

> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury. * * *.[1]

[1] To dispel all doubt as to the exclusiveness of the Customs Court's jurisdiction, Congress, in defining the original jurisdiction of the district courts, has expressly excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court" (28 U. S. C. 1340, *infra*, p. 10).

Final decisions of the Customs Court are subject to review by appeal to the Court of Customs and Patent Appeals (28 U. S. C. 1541) and, in turn, "[c]ases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari." 28 U. S. C. 1256 (*infra*, p. 10).

The explicit provisions for jurisdiction in the Customs Courts—to the exclusion of the district courts—mark the continuation of a well-defined and long-established policy.[2] Thus, the courts have repeatedly recognized, even in cases which arose prior to the adoption of the explicit provision appearing in 28 U. S. C. 1583, that the Customs Courts have

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[2] Congress initiated this practice with the Customs Administration Act of 1890 (26 Stat. 131), in which it undertook the establishment of a separate specialized system of courts for the resolution of customs controversies. In the 1890 Act, Congress provided for a Board of General Appraisers (Section 12, 26 Stat. 136), which was to have jurisdiction over all protests from decisions of the collectors of customs, and appeals for reappraisement. Sections 13, 14, 26 Stat. 136–138. Under Section 15 of the 1890 Act (26 Stat. 138), the courts of general jurisdiction participated in this review procedure at the appellate level. However, even this participation was eliminated by the Tariff Act of 1909, 36 Stat. 11, 91. By that Act, Congress withdrew from the courts of appeals jurisdiction to review decisions of the Board of General Appraisers and vested that jurisdiction in the Court of Customs Appeals, which it simultaneously established. Section 29, 36 Stat; 105–107. In 1926, the Board of General Appraisers was redesignated as the Customs Court. 44 Stat. 669. In Public Law 703, 84th Congress, Second Session, Congress declared the Customs Court "to be a court established under Article III of the Constitution of the United States." The present provision for exclusive jurisdiction in that court (28 U. S. C. 1583) first appeared in the 1948 revision of the Judicial Code (62 Stat. 943).

exclusive jurisdiction in customs matters, and that, by the same token, the district courts are without jurisdiction. *Morgantown Glassware Guild, Inc.,* v. *Humphrey,* C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *United States* v. *Sherman & Sons Co.,* 237 U. S. 146, 152; *Boston Wool Trade Ass'n* v. *Snyder,* 161 F. 2d 648 (C. A. D. C.); *United States* v. *Cottman Co.,* 190 F. 2d 805 (C. A. 4), certiorari denied, 342 U. S. 903; *Cottman Co.* v. *Dailey,* 94 F. 2d 85 (C. A. 4); *David L. Moss Co.* v. *United States,* 103 F. 2d 395 (C. C. P. A.); *Riccomini* v. *United States,* 69 F. 2d 480 (C. A. 9); *Patchogue-Plymouth Mills Corp.* v. *Durning,* 101 F. 2d 41 (C. A. 2); *Gulbenkian* v. *United States,* 186 Fed. 133 (C. A. 2).

2. That appellants' complaint is directed to the Anti-Dumping Act of 1921[3] in no way militates against the exclusive jurisdiction of the Customs Courts. *Cottman Co.* v. *Dailey, supra.* By Section 210 of the Act (19 U. S. C. 169, *infra,* p. 11) the assessment of a special dumping duty is made subject to appeal and protest in the same way as are other customs assessments; and Section 210 provides further that "the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law" (19 U. S. C. 169). The

[3] Act of May 27, 1921, 42 Stat. 11, as amended, 19 U. S. C. 160 *et seq.*

review jurisdiction of the Customs Courts, in terms, thus extends to "all orders and findings" (28 U. S. C. 1583) entering into the assessment of a special dumping duty in the same manner and to the same extent as with other customs assessments. Since appellants have assiduously avoided the prescribed review procedure in the Customs Courts, plainly they are in no position to question the adequacy of such review in this proceeding. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; 767; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868 (summarily reversing a statutory three-judge court in *Jonco Aircraft Corp.* v. *Franklin*, 114 F. Supp. 392 (N. D. Tex.)).

The fact that appellants' complaint in the district court includes an attack upon the constitutionality of the Anti-Dumping Act likewise affords no ground for engrafting an exception upon the perfectly adequate review procedure Congress has provided through the Customs Court and the Court of Customs and Patent Appeals. *Morgantown Glassware Guild, Inc.* v. *Humphrey*, C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C. A. 4); *Riccomini* v. *United States*, 69 F. 2d 480 (C. A. 9). On the contrary, the presence of constitutional issues serves to emphasize the necessity for compliance with the statutory remedy available to appellants. For an observance of the customary procedures may yield a result by which the resolution of any constitutional issues may be ren-

dered unnecessary or, short of that, may result in narrowly defining such issues. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772–773. Contrary to appellants' assertion, "the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals extends beyond the mere review of accuracy of appraisals and classifications of merchandise" (Jurisdictional Statement, pp. 21–22). If, as appellants contend (Jurisdictional Statement, pp. 8–10), substantial constitutional questions are necessary to a disposition of the case, the Customs Court and the Court of Customs and Patent Appeals are competent now, as they have been in the past, to pass upon such questions in the first instance. *Morgantown Glassware Guild, Inc.* v. *Humphrey,* C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *Hampton, Jr., & Co.* v. *United States,* 14 Ct. Cust. Appls. 350, affirmed, 276 U. S. 394; *United States* v. *Towers & Sons,* 14 Ct. Cust. Appls. 421; *United States* v. *Central Vermont Ry. Co.,* 17 C. C. P. A. 166 (Customs); *United States* v. *William Prym,* 17 C. C. P. A. 180 (Customs); *Kleberg* v. *United States,* 71 F. 2d 332 (C. C. P. A.); *United States* v. *Sears, Roebuck & Co.,* 20 C. C. P. A. 295 (Customs); *United States* v. *Fox River Butter Co.,* 20 C. C. P. A. 38 (Customs), certiorari denied, 287 U. S. 628.[4]

[4] Under 28 U. S. C. 1253 (*infra,* p. 10) a direct appeal lies to this Court from "an order granting or denying * * * an interlocutory or permanent injunction in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges." The jurisdiction of this Court

CONCLUSION

For the foregoing reasons, we respectfully submi
that the judgment of the district court should b
affirmed or, in the alternative, that the appeal shoul
be dismissed.

J. LEE RANKIN,
Solictor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
JOHN G. LAUGHLIN,
Attorneys.

NOVEMBER 1956.

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on appeal thus depends upon whether this case is one of th
limited few which was required to be heard by a three-judg
district court. *Smith* v. *Wilson*, 273 U. S. 388, 389. If th
issues appellants seek to raise are exclusively within the juris
diction of the Customs Courts, it would appear that this cas
did not require the presence of a court of three judges (see 2
U. S. C. 2282, *infra*, p. 11) and was properly remitted to
single district judge for appropriate action. *Infra*, p. 9
If a three-judge court was not required, direct appeal to thi
Court does not lie and dismissal of the appeal would, therefore
appear to be in order. *Oklahoma Gas Co.* v. *Packing Co.*, 29
U. S. 386, 391–392; *Ex parte Poresky*, 290 U. S. 30.

APPENDIX A

In the United States District Court for the District of Columbia

HOLDING A THREE JUDGE STATUTORY COURT

Civil Action No. 1038–56

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING CO., INC., PLAINTIFFS

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND UNITED STATES TARIFF COMMISSION, DEFENDANTS

Before: WASHINGTON, *Circuit Judge,* and WILKIN and MCGUIRE, *District Judges*

Order

This cause came on to be heard on the complaint, the separate motions to dismiss filed by defendants, and on plaintiffs' application for an injunction;

On consideration whereof, it is ordered by this Court that this cause be, and it is hereby, remitted to District Judge Matthew F. McGuire, sitting as a single judge, for appropriate action.

(S) GEORGE T. WASHINGTON,
Circuit Judge.

(S) ROBERT N. WILKIN,
District Judge.

(S) MATTHEW F. MCGUIRE,
District Judge.

JUNE 20, 1956.

APPENDIX B

28 U. S. C. 1253 provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U. S. C. 1256 provides as follows:

> Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

28 U. S. C. 1340 provides as follows:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

28 U. S. C. 1583 provides as follows:

> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws.

28 U. S. C. 2282 provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 210 of the Act of May 27, 1921 (The Anti-Dumping Act), 42 Stat. 15, as amended, 19 U. S. C. 169, provides as follows:

> For the purposes of sections 160–171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED,
Appellants,

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

APPELLANTS' REPLY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

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TABLE OF CITATIONS

Cases

	Page
Cotonificio Bustese v. *Morgenthau*, 121 F. 2d 884 (CA DC, 1941)	3
Croton Watch Co. v *Laughlin*, 208 F. 2d 93 (CA 2, 1953)	2
DeLima v. *Bidwell*, 182 U.S. 1 (1901)	2
In re Fassett, 142 U.S. 479 (1892)	2
Goetze v. *United States*, 182 U.S. 221 (1901)	2
Helwig v. *United States*, 188 U.S. 605 (1903)	3
Kleberg & Co. v. *United States*, 71 F. 2d 332, 21 CCPA 110 (1933)	4
Morgantown Glassware Guild v. *Humphrey*, 236 F. 2d 670 (CA DC, 1956)	3
Riccomini v. *United States*, 69 F. 2d 479 (CA 9, 1934)	4
Robertson v. *Frank Bros.*, 132 U.S. 17 (1889)	3
Robinson & Co. v. *United States*, 14 Ct. Cus. App. 209 (1926)	4
T. D. 12996 (CC, 1892)	3
United States v. *Passavant*, 169 U.S. 16 (1898)	3

Statutes

19 U.S.C. 169, Section 210 of the Anti-Dumping Act of 1921	2
19 U.S.C. 1501, Section 501 of the Tariff Act of 1930	2
28 U.S.C. 1583, Act of June 25, 1948	2, 3, 4

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On Appeal from the United States District Court for the District of Columbia

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APPELLANTS' REPLY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

This brief in opposition to Appellees' motion to affirm or dismiss is filed pursuant to Rule 16 (3) of the Revised Rules of this Court.

ARGUMENT

1. Appellees' motion to affirm or dismiss is based solely upon the asserted exclusive jurisdiction of the Customs Courts "in the operation of laws relating to the assessment and collection of customs duties" (Appellees' Brief, p. 3). This has been conceded, *arguendo*, by Appellants (Jurisdic-

tional Statement, pp. 5, 11). But the instant action is not directed either at "assessment and collection," or at the decisions or determinations of the officials who perform assessment and collection functions, or at "customs duties."

The complaint herein is directed at agency actions which precede the "assessment and collection" procedure, just as the determination whether a foreign commodity is an "import" at all preceded assessment and collection in *In re Fassett*, 142 U.S. 479 (1892); and the determination whether certain goods were imported from a "foreign country" preceded assessment and collection in *DeLima* v. *Bidwell*, 182 U.S. 1 (1901), and *Goetze* v. *United States*, 182 U.S. 221 (1901); and the determination whether certain imports should be barred from entry preceded assessment and collection in *Croton Watch Co.* v. *Laughlin*, 208 F. 2d 93 (CA 2, 1953). In all the cited cases, jurisdiction over these "customs" matters that preceded assessment and collection was found to lie in the District Courts, rather than in the Customs Courts. In those cases, as here, it was recognized that any questions that might subsequently arise involving assessment and collection would be reviewable only in the Customs Courts. But in those cases, as here, the prior agency action deciding whether any assessment and collection functions were necessary or proper is reviewable in the District Courts.

Similarly, the complaint herein is directed at the actions of officials who have no part in the assessment and collection functions reviewable in the Customs Courts. The reviewing authority of the Customs Court is limited to "decisions of the *appraiser*" (19 U.S.C. 1501) and "decisions of the *collector*" (28 U.S.C. 1583). Similarly, the reviewing authority of the Customs Court in anti-dumping matters is specifically limited to "the determination of the *appraiser* . . . and the action of the *collector*" (19 U.S.C. 169). There is no statute granting the Customs Court reviewing authority over the actions of the Secretary of the Treasury or the

determinations of the United States Tariff Commission, Appellees herein.

Finally, the complaint herein is not directed at "customs duties," such as those involved in *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670 (CA DC, 1956), and the numerous other cases cited by Appellees (Appellees' Brief, p. 5). Rather, it is directed at special additional duties, over and above the regular "customs duties," like the "additional duty" for undervaluation in *Helwig* v. *U. S.*, 188 U.S. 605 (1903), and like the "additional duty" for failure to mark imports properly in *Cotonificio Bustese* v. *Morgenthau*, 121 F. 2nd 884 (CA DC, 1941). In these cases, as here, the validity of these special additional duties over and above the regular customs duties is properly cognizable in the District Court, rather than the Customs Court.

2. Appellees cite the provisions of 28 U.S.C. 1583, authorizing exclusive Customs Court review of "the decisions of any collector of customs, including all orders and findings entering into the same . . ." (Appellees' Brief, p. 3). They suggest that this reviewing authority extends not only to the "decisions of any collector" but also to all "orders and findings" of the Secretary and the Tariff Commission having any bearing on the collector's decision (Appellees' Brief, p. 6). It is clear, both from the language of the Section and from decisions thereunder, that Section 1583 means no such thing. What it makes subject to review under the protest procedure is a decision of the collector, including any prior order or determination *by the collector* entering into his final decision. Only such an order or finding could be included within the term "decision of any collector" made subject to review.

Thus, it has long been the established rule that a valuation decision by the appraiser, although it certainly "enters into" the decision of the collector to assess duties, is not subject to review under this Section. *T.D.* 12996 (CC, 1892); *cf. United States* v. *Passavant*, 169 U.S. 16 (1898), *Robert-*

son v. *Frank Bros.*, 132 U.S. 17 (1889). Similarly, the Court of Customs Appeals has held that a protest is aimed against the decision of the collector, not against an order of the Secretary of the Treasury directing him to take such action. *Robinson Co.* v. *United States*, 14 Ct. Cus. App. 209 (1926).

More recently, in considering the specific language of Section 1583, the Ninth Circuit Court of Appeals, in *Riccomini* v. *United States*, 69 F. 2d 479, 483 (CA 9, 1934), stated its meaning as being that "every such decision, order, and finding *of a collector* may be protested and reviewed" exclusively in the Customs Court. Here, there has been no such decision, order or finding, and there is thus no support for the intimation that the Secretary's Finding of Dumping and the Tariff Commission's determination of injury are subject to Customs Court review under the provisions of Section 1583.

3. Appellees state that Appellants "have assiduously avoided the prescribed review procedures in the Customs Court" and therefore "are in no position to question the adequacy of such review" (Appellees' Brief, p. 6). There has, in fact, been no such avoidance of Customs Court review. Such review will be open to Appellants only after assessment or collection has been completed, and even then will be limited to those questions raised by such assessment or collection. There is no right to Customs Court review of those agency actions that precede assessment and collection (*supra*, p. 1). Moreover, if and when the technical issues raised in assessment and collection are presented to the Customs Court, that Court has no authority to consider major substantive issues raised by the complaint herein or to grant the relief sought (*Kleberg & Co.* v. *United States*, 71 F. 2d 332, 21 CCPA 110 (1933), and other cases cited in Jurisdictional Statement, p. 13).

4. In these circumstances, where the Customs Courts have denied their own authority to inquire into the substantive

validity of an agency action, the resolution of these problems short of the constitutional issues is possible only in the District Court, for the Customs Court has denied its power to consider the non-constitutional questions raised herein. Thus, the very circumstances that establish the absence or inadequacy of Customs Court review also impel resort to the District Court not only to provide Appellants with an adequate remedy, but also to permit possible resolution of this cause without recourse to the serious constitutional issues presented.

For these reasons, we respectfully submit that Appellees' motion to affirm or dismiss should be denied.

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No. 474. HORTON ET AL. *v.* HUMPHREY, SECRETARY OF THE TREASURY, ET AL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *James R. Sharp* and *Eugene F. Bogan* for appellants. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for appellees. Reported below: 146 F. Supp. 819.